No. 15,651

In the

United States Court of Appeals

For the Ninth Circuit

AMERICAN RADIATOR AND STANDARD SANITARY CORPORATION, a corporation,
Appellant,

vs.

L. L. FORBES and A. W. BODINE, Doing Business as L. L. FORBES CONSTRUCTION COMPANY, and THE HOME INDEMNITY COMPANY, a corporation,
Appellees.

Joint Brief for the Appellees

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STATEMENT OF THE CASE

Appellant's Statement of the Case should, we believe, be supplemented and clarified as follows:

1. As clearly appears from the amended complaint (R.3), the action is upon the contractor's bond executed by the defendants Forbes and Bodine, as principals, and the defendant, The Home Indemnity Company, as surety. The amended complaint alleges that the bond was conditioned upon the faithful performance of the contract and the satisfaction of all bills, charges and liens for labor and materials incurred in the performance of the contract. However,

the bond, a copy of which is attached to Appellant's Brief (Appendix, Page XIII), was conditioned upon the indemnification of the School District against loss or damage caused by the failure of the principal to faithfully perform the contract; and said bond expressly provided that no right of action should accrue upon or by reason of the bond to or for the use of anyone other than the obligee therein named.

2. The statement at the beginning of Appellant's Statement of the Case that the action was brought by American Radiator to recover the unpaid balance of the purchase price of materials which it furnished for installation for the construction of the classroom additions might be taken to imply that materials were furnished by Appellant with the intent or purpose on its part that they were to be installed and used in the construction of the additions. This does not anywhere appear in the record. The record, as appears in the Agreed Statement of Facts (R.14), is that Bachman, a subcontractor, purchased plumbing materials and supplies from the Appellant and that some of the materials were incorporated in the classroom addition, and it nowhere appears that there was any intent, purpose, knowledge, or understanding on the part of Appellant that any of the materials were to be so installed or used.

3. The statement of Appellant on Pages 6 and 7 of its Brief of the facts on which the question of liability should be based should be modified. Numbers 1 and 2 at the bottom of Page 6 should be worded as follows: 1. There has been a written contract between the general contractor and the School District, in the form involved herein (Appendix to Appellant's Brief, Page I), which, among other things, provided that, except as otherwise noted in the contract, the contractor should provide and pay for all materials,

labor, tools, water, power and other items necessary to complete the work, and which contract further provided that certain items, such as surveys, certain permits, licenses and easements and certain insurance should be secured and paid for by the owner. 2. The general contractor has accepted payment of the statutory redemption fund without having furnished to the public authority any receipt or lien waiver from the party who sold materials to a subcontractor, evidencing payment for the materials, but the general contractor, before accepting payment of said statutory redemption fund, paid the subcontractor for the materials and furnished to the public authority a satisfactory receipt of the subcontractor evidencing such payment by the general contractor to the subcontractor.

Further, there should be added to the Statement of Appellant of the facts involved in said question of liability, following Paragraph 3 at the top of Page 7 of its Brief, additional Paragraphs 4 and 5 as follows: 4. The action brought by the seller of materials to the subcontractor is an action on the bond of the general contractor, which bond was conditioned for the indemnification of the obligee, the school district, against loss or damage caused by the failure of the principal to satisfactorily perform the contract, and which bond expressly provided that no right of action should accrue upon or by reason of the bond to or for the use of anyone other than the obligee therein named. 5. The statute makes no provision for a bond to be furnished conditioned for the payment of labor or materials.

SUMMARY OF ARGUMENT

Forbes' contract with the School District was a contract between the School District and the general contractor and was not a contract for the benefit of materialmen supplying

materials to a subcontractor and the contract conferred no third party beneficiary rights upon such materialmen. To come within the orbit of the third party beneficiary rules, it must appear that the contracting parties intended to benefit the third party by said contract. No such intent is present here.

Appellant, American Radiator, in this case sold materials to the subcontractor, Bachman, in reliance solely on the credit of said subcontractor and not in reliance upon any provisions contained in the contract or in the bond executed by Forbes to the School District.

II.

There is no Arizona statute directing a School District to require a bond conditioned for the benefit of material suppliers of subcontractors, such as Appellant here. The Arizona statute merely calls for a bond "conditioned upon the faithful performance of the contract". The bond executed in the instant case complies with this statute. In addition the bond clearly states that it is an indemnity bond, the sole purpose of which is to indemnify the Board of Supervisors or the School District against loss or damage directly caused by the failure of the Principal (Forbes) to faithfully perform said contract. Further, the bond expressly provides: "that no right of action shall accrue * * * for the use of anyone other than the Obligee herein named". It is obvious that a bond, which is of the type furnished in this case and which contains the above provisions, does not inure to the benefit of a third party, and Appellant, being a third party, is not entitled to sue and recover on the bond.

III.

The Arizona statute, governing contracts for the erection of public buildings, requires the Board of Supervisors to

retain ten (10) percent of all estimates as guarantee of the complete performance of the contract, to be paid to the contractor within sixty-five (65) days after completion, or on filing of notice of completion of the contract, provided the contractor has duly furnished the agent satisfactory receipts for all labor and material bills and waivers of liens from any and all persons holding claims against the work.

The statute definitely states that the 10% of the contract price is to be paid to the contractor within 65 days after completion and does not state "not prior to 65 days from completion of the contract" as set forth in appellant's brief. Pursuant to a contract between Forbes and the subcontractor, W. M. Bachman, dba Bachman Plumbing Company, and for an agreed sum, Bachman undertook to furnish all necessary labor and material required for the installation of certain plumbing equipment in the erection of the public school. Forbes paid the subcontractor Bachman in full for the labor and materials furnished by the subcontractor Bachman, and thereafter Forbes furnished a satisfactory receipt from the subcontractor Bachman to the Board of Supervisors. Forbes therefore fully complied with the contract and there was no breach thereof on which any action could be maintained. Forbes further fully complied with the statute and did not receive the retention fund in violation of the statute; thus, no constructive trust could be impressed on the retention funds in favor of the appellant.

ARGUMENT

I. The Contract Between Forbes and the School District Was for the Purpose of Delineating the Obligations to Be Undertaken by Each of the Parties to Said Contract—and Was Not Intended to Confer a Benefit Upon Third Parties.

The first argument relied upon by appellant is to the effect that the contract between the School District and

the general contractor conferred third party beneficiary rights upon appellant. To support this contention, appellant quotes an excerpt from Article 1 of the contract and Article 3 of the General Conditions.

Appellees contend that these Articles were obviously inserted to delineate the relative obligations of the parties to the contract and to negate any idea that the School District would furnish materials for the job. Just the same as Article 5 of the General Conditions on the other hand provides that the owner (School District) should furnish all surveys unless otherwise specified, and again that the owner was to secure and pay for all permits, licenses, etc. It is manifest that by these clauses the parties intended to set out their mutual duties and obligations towards *each other*. Article 3 of the General Conditions also sets out that the contractor was to pay for all power necessary to complete the work. Was this clause inserted for the benefit of the Arizona Public Service Company? Did the parties intend to create a direct and primary obligation in favor of Arizona Public Service by having provided that the contractor was to pay for the power necessary to complete the work? This clause was inserted merely to clarify the fact that the School District was not to furnish the power necessary in the erection of the building, and that the contractor would have to supply the power.

The heading of Article I of the contract is entitled: "Scope of the Work". This, in conjunction with the whole of said Article is strong evidence of the fact that the primary purpose of the agreement and attendant documents, was to define and limit the duties and obligations of the two *contracting parties*.

The intent of the parties is further evidenced by the fact that the bond in the instant case was executed simul-

taneously with the contract and the provisions of said bond, accepted by the School District, provided that no right of action shall accrue to or for the use of anyone other than the obligee. If it was the intent of the School District and the contractor that third parties should be benefited under the contract, then most certainly a protective clause would have been inserted in the bond for the benefit of such third persons.

A reading of the contract as a whole and the attendant documents and an examination of the circumstances surrounding its execution make it clear that the contracting parties had no intention whatever to confer benefits upon any person, such as the appellant, who is a stranger to the contract.

As to the contract itself, the rule is well established that parties are presumed to contract for their own benefit, and that one not a party to a contract will not be permitted to claim thereunder unless it clearly appears that the parties to the contract intended it to be for his benefit. *Citizens National Bank v. Texas and Pacific Railway Co.,* 136 Tex. 333, 150 S.W. 2d 1003; *Knox v. Ball,* 144 Tex. 402, 191 S.W. 2d 17; *Electric Appliance Co., v. United States Fidelity and Guaranty,* 110 Wis. 434, 85 N.W. 648; 12 Am. Jur., page 834; 17 C.J.S. pages 1143 and 1220.

In the instant case Forbes, the principal contractor, is not liable for materials furnished to a subcontractor because no privity of contract exists between him and materialmen. 17 C.J.S., page 1143; *Board of Public Education and Wilmington, etc., v. Aetna Casualty & Surety Company,* 34 Del. 355, 152 Atl. 600, 603; *Kruse v. Wilson,* 3 Calif. App. Rep. 91, 84 Pac. 442; *McKenzie v. Neale Construction Co.,* 75 Wyo. 175, 294 Pac. 2d 355; *Llewellyn Iron Works v. Reed, et al,* 123 Calif. App. Rep. 607, 11 Pac. 2d 657; *Russell Lumber &*

Supply Co. v. Grooms, 231 Ky. 544, 21 S.W. 2d 835, 13 C.J. page 713, Note 57; 17 C.J.S., page 1143.

Some of the requirements in order to construe a contract as creating a third party beneficiary obligation are set out in 17 C.J.S., page 1127, as follows:

> "That the parties must have clearly intended the contract to be for the benefit of the third person * * * is one of the most commonly expressed limitations on the rule, * * *"

and on page 1129,

> "The intent to benefit the third person must clearly appear from the language of the agreement, * * *"

and on page 1131,

> "It has been held that the contract must have been made completely and primarily for the benefit of the third person * * *."

American Jurisprudence, Volume 12, Contracts, page 833, states the rule as follows:

> "A third person for whose direct benefit a contract was entered into may sue for breach thereof; but if the benefit is only incidental, he may not. It has been asserted that before a stranger can avail himself of the exceptional privilege of suing for a breach of agreement to which he is not a party, he must at least show that it was intended for his direct benefit. It must appear, in order that a third person may derive a benefit from a contract between two other parties, that the contract was made and entered into *directly and primarily for the benefit of such third person.* * * *" (Emphasis supplied.)

In the instant case, none of these requirements is present. It is obvious that the School District was only concerned with getting its building constructed. The clause saying

that the contractor shall provide and pay for all materials, labor, tools, water, power and other items necessary to complete the work was inserted to make clear that the materials, labor, tools, water, power and other items necessary in the erection of the building were to be furnished by the contractor and not by the School District, just the same as the provisions that the School District would furnish and pay for surveys, permits, licenses, etc., indicate the items which the School District was to pay. Nowhere is there any mention of any third party, and nowhere, either expressly or by implication, is there any intention shown to confer a benefit on some third party. Rather, every circumstance points to the contrary and indicates that the parties were concerned only with themselves.

It is interesting to note that appellant has advanced no argument whatsoever, nor has he cited any provisions of the contract, which support his contention that the contract involved herein was one for the benefit of appellant. In all probability it is because of this void that from the very inception of this action appellant has never asserted any rights under the contract. Appellant's amended complaint alleges a claim based solely on the bond and not on the contract. In support of his first contention appellant relies entirely on cases which are clearly distinguishable from the instant case as we will show and which are cases involving interpretation of provisions of bonds and not of contracts.

We unhesitatingly submit that there is nothing in any of the cases cited by appellant in support of his first argument that by any form of analogy could it be logically concluded that the courts of Arizona would hold for the appellant in the instant case.

The decision of the Court in the case of *Webb v. Crane*, 52 Ariz. 299, 80 P.2d 698, cited by appellant was clearly

based upon the provision contained in the bond involved in that case. The bond contained a provision for the payment of laborers and materialmen, the bond was conditioned for their benefit, but did not in terms give them a direct right of action on the bond. Since the bond contained a provision for their benefit, the Arizona Court simply allowed them to have a right of action in order to enforce and give meaning to the provision which had been inserted for their benefit. These facts are entirely different from the facts of the instant case. The bond with which we are concerned not only contains no provision for the benefit of laborers and materialmen, but recites that it is an *indemnity* bond only, and specifically provides that *no one* other than the named Obligee shall have any right of action thereunder.

A part of the opinion from *Webb v. Crane* which appellant quotes is as follows:

> "The right of laborers and materialmen to recover on a bond executed in connection with public works or improvements, *where the bond contains a condition for their benefit and is intended for their protection,* although the public body is the only obligee named therein, and there is no express provision that such third parties shall have any rights thereunder, is affirmed by the great weight of authority." (Emphasis supplied.)

The foregoing statement was taken by the Court from an annotation on this subject in 77 A.L.R. On page 106 of this very same annotation, that authority has this to say about the type of fact situation presented in the case at bar:

> "It may be stated as a general principle that a laborer or materialman cannot recover on a bond executed by a contractor to the public body, *conditioned only to indemnify or hold harmless* the obligee against loss or damage resulting from the defaults of the contractor." (Emphasis supplied.)

In the resume and conclusion of this annotation, on page 213, the law is stated to be that:

> "According to the prevailing rule, the right of laborers and materialmen to recover on a contractor's bond depends upon the terms of the instrument. It depends upon whether the bond is actually for the benefit of such persons, or is for the protection of the nominal obligee and merely incidentally benefits the third parties * * *" "Where the bond is conditioned merely to indemnify and hold harmless the owner or public body, it seems, both by authority and reason, that it does not inure to the benefit of laborers and materialmen so as to enable them to recover thereon."

In the case of *Knight & Jillson Co. v. Castle,* 172 Ind. 97, 87 N.E. 976, 27 L.R.A. (NS) 573, cited by appellant, a contract and bond with the following provisions was involved. The contract provided:

> "Parties of the Second Part agree to pay for all labor and materials used in said work when due and that all labor done and materials furnished shall be of the best quality of their several kinds and the Parties of the Second Part agree to deliver said building to said First Party freed from all liens or right thereto."

The bond entered into in this case reads:

> "Whereas said Principal has entered into a written contract dated April 24, 1903, with said Obligee for the plumbing, steam heating and electric wiring for St. Joseph's Catholic Church, a copy of which contract is hereto annexed. Now, THEREFORE the conditions of this obligation is such, that if the said principal shall faithfully perform said contract on their part, according to the terms, covenants and conditions thereof (except as hereinafter provided), then this obligation shall be void, otherwise to remain in full force and effect."

The facts in the *Knight & Jillson* case show that Knight & Jillson Co. was a materialman who supplied material *directly to the general contractor,* rather than to the subcontractor as in the case at bar.

Further, the plaintiff in that action included, as a part of his complaint, the contract and bond; in addition, the plaintiff alleged that at the time he sold and delivered the materials to the contractor, said plaintiff had knowledge of the execution of the bond and relied upon the same to secure payment for the materials delivered to the general contractor. This, of course, indicates that the materialman unquestionably relied upon the bond and contract, and the provisions thereof, rather than the credit of the one to whom he supplied the materials, as in the case at bar. In the instant case, the appellant furnished the material to the subcontractor and appellant's recourse by virtue of the contract and bond was strictly an afterthought.

In the *Knight & Jillson case,* the Court in its opinion, speaking of third party beneficiaries contracts says that the third party beneficiary rules "are to be applied with discrimination respecting each particular case". It is obvious from the foregoing that each case, wherein a third party beneficiary question is raised, must be decided upon its own set of facts and the doctrine of stare decisis is of little benefit.

In the *Knight & Jillson* case, the provisions of the bond involved therein were entirely different from those of the bond involved in the instant case. Furthermore, the bond in the instant case is an indemnity bond and specifically limits any right of action therein to the named Obligee. Had this provision been a part of the bond in the *Knight & Jillson* case, we have no doubt that the Court there would have held differently.

The case of *Standard Acc. Ins. Co. v. Simpson,* 4 Cir., 64 F.2d 583 and the Annotations in 70 A.L.R. 308 (supplemented in 111 A.L.R. 311) referred to by the appellant in his first argument, refer to situations wherein a bond was given pursuant to statute, to secure payment for labor and materials furnished in the construction of a public building or other public improvement, or the bond itself provided that the contractor would pay when, and as due, all lawful claims for labor furnished, or materials and supplies furnished. Whereas, in the instant case, the contractor's bond is conditioned only to indemnify the named Obligee against loss or damage directly arising by reason of the contractor's failure to faithfully perform the contract; and there are no statutes in Arizona requiring a bond conditioned for the payment of labor and material.

Likewise, the cases of *United States Use of Hill v. American Surety Company,* 200 U.S. 197, 50 L.Ed. 437, 26 S.Ct. 168 and *City of Portland v. New England Casualty Co.,* 78 Ore. 195, 152 Pac. 253, cited by appellant in his Argument I, both involve statutes enacted primarily for the benefit of laborers and materialmen, and the contracts and bond entered into, contained similar protective provisions. Neither case is akin to the instant case, but will be treated more fully later in this brief.

In the case of *Hipwell v. National Surety Company,* 130 Iowa 656, 105 N.W. 318, cited in appellant's brief at page 19, a *statute* was construed that provided that when a bond or other instrument given to a State or County or other municipal or school corporation, or to any officer or persons, is intended for the security of the public generally, or of particular individuals, action may be brought thereon in the name of any person intended to be thus secured, who has sustained an injury in consequence of a breach thereof, except when otherwise provided. And where, in that case,

in a contract for the construction of a public building, the contractor agreed to pay promptly for all labor and materials used in the building and the bond was conditioned on compliance with all terms and conditions of the contract, the Court merely held that the failure of the contractor to pay subcontractors furnishing labor and materials, was a breach of the bond and authorized the subcontractors to maintain an action thereon *under the Iowa statute.*

The reference to 77 ALR 141, contained on Page 20 of Appellant's Brief, is preceded by the following text material: "The purpose and practical effect of *statutes* requiring of contractors for public work a bond for the benefit of laborers and materialmen is to give to such persons protection or security in lieu of, or analogous, to the mechanic's lien accorded it in a case of a contract between private individuals." (Italics added.) It is apparent from observation of the quoted text material that the cases cited thereunder deal only with situations where there is an existing statute that requires contractors to execute a bond for the benefit of laborers and materialmen. There is no such statute in the State of Arizona, consequently, these cases can have no bearing on any decision reached in the instant case.

Appellant has cited no cases where a statute similar to the Arizona statute has been interpreted. All cases cited by appellant include an explicit provision in either the statute or the bond requiring protection of laborers and materialmen. None of the cases cited appertain to interpretations of contracts which would in any way support appellant's contention that the contract of Forbes with the School District was for the benefit of materialmen. We will cite cases involving the interpretation of provisions in bonds in support of our second argument herein. These cases will be found to be more in point than any of the cases cited by appellant in support of his first argument.

II. Where the Condition of the Bond Is That the Bonding Company Shall Indemnify the Named Obligee and There Is No Statute Providing Otherwise, No Right of Action Accrues Upon the Bond to Anyone Other Than the Said Named Obligee.

The Bonding Company is the surety on the bond of Forbes. The obligee is the Board of Supervisors of Maricopa County, Arizona, acting for Glendale Union High School District.

The condition of this particular bond is as follows:

> "* * * if the Principal shall *indemnify* the obligee against loss or damage directly caused by the failure of the Principal to faithfully perform said contract, then this obligation shall be void; otherwise to remain in full force and effect." (Emphasis supplied.)

It will be seen that this is clearly an indemnity bond, and not a direct obligation or payment bond. In other words, it does not create a direct obligation to third persons, but is conditioned only upon indemnification of the Board of Supervisors or the School District against any loss. The Board and the School District have been dismissed from this lawsuit; consequently, no obligation or liability will be imposed upon them which could require indemnity under the bond.

It is impossible to see how anything could be more clearly expressed, than that this bond is designed only for the protection of the obligee, and that others are to be given no rights under it.

Since the bond which was actually given contained no provision for the benefit of appellant, let us see whether there was any duty, by statute or otherwise, for the School District to require a bond conditioned for the benefit of appellant. The bond was furnished in compliance with Section 10-610, A.C.A. 1939 as amended. This statute merely requires a bond

conditioned upon the faithful performance of the contract, and to be approved by the Board.

Nowhere in our statute is there anything stated which requires the School District to demand a bond conditioned for the benefit of material suppliers of subcontractors. Therefore, terms of the bond are not broadened by statute. The statute requiring the bond does not specify the form of the bond and does not require a bond conditioned for the benefit of material suppliers of subcontractors. Compare the Arizona statute with the statute in force in Iowa, which is a typical statute requiring a third party bond. Section 573.2 of the Code of Iowa reads as follows:

> "Contracts for the construction of a public improvement shall * * * be accompanied by a bond, with surety, conditioned for the faithful performance of the contract, and for the fulfillment of such other requirements as may be provided by law. * * *"

And immediately thereafter, in Section 573.6, their statute further provides:

> "The following provisions shall be held to be a part of every bond given for the performance of a contract for the construction of a public improvement, whether such provisions be inserted in such bond or not, to-wit:
>
> 1. The principal and sureties on this bond hereby agree to pay to all persons, firms, or corporations having contracts directly with the principal or with subcontractors, all just claims due them for labor performed or materials furnished, in the performance of the contract on account of which this bond is given, * * *"

The Iowa statute expressly and specifically sets out that third persons are to be protected by a public contractor's bond. No mandate of this sort is to be found in the Arizona statute.

The general rule is that in the absence of a provision in the statute as to the form or conditions of a bond required, such matters are left to the discretion of the authorities authorized to require the bond. See 78 C.J.S., Schools and School District, Page 1270, where it is said:

> "In the absence of a provision in the statute as to the amount, form, or conditions of a bond required of a contractor with school authorities, such matters are left to the discretion of the authorities authorized to require the bond."

Because our statute does not define the form or conditions of the bond referred to, it becomes apparent that the School District was free to select the type of bond they desired. This they have done, and the bond which they selected was not a bond conditioned for the benefit of third persons. Consequently, the bond is not varied by the statute, and construed in the light of the statute which required it, is in nowise changed or altered, and does not inure to the benefit of appellant. In 78 C.J.S. at Page 1271, the following statement of law is found:

> "A bond for the faithful performance and to save the board harmless from loss resulting from the contractor's breach protects the board from any claim against it on account of labor or material; a bond for faithful performance, *but not for payment of claims of laborers and materialmen, does not inure to the benefit of laborers and materialmen.*" (Emphasis supplied.)

There is one specific provision which forecloses the right of the appellant to recover on the bond. The bond contains this express limitation:

> "PROVIDED, however, and upon the Express Conditions, the performance of each of which shall be a condition precedent to any right of recovery hereon:
> * * * * * * *

"FIFTH: That no right of action shall accrue upon or by reason hereof to or for the use of anyone other than the Obligee herein named; that the obligation of the Surety is, and shall be construed strictly as one of suretyship only; * * *"

In *118 A.L.R. at page 78,* the rule is stated as follows:

"Laborers and materialmen cannot recover on a public contractor's bond conditioned merely to indemnify the named obligee against loss or damage resulting from the contractor's default in the performance of the contract, where the bond contains an express provision that no right of action shall accrue thereon for the use or benefit of anyone other than such obligee."

And *in 78 C.J.S. at page 1279,* the rule is stated to be:

"A bond conditioned for the payment of laborers and materialmen may be so worded and construed to protect only the school district or other local school organization, *particularly where the bond expressly stipulates that no right of action shall accrue for the use or benefit of anyone other than the school authorities as obligee.*" (Emphasis supplied.)

And *in 78 C.J.S. at Page 1283,* it is stated that:

"The liability of a surety on a bond given by a school contractor conditioned for the payment of laborers and materialmen is limited by the terms of its contract."

And again, *in 78 C.J.S. at Page 1293:*

"In the absence of statute, the right to sue for the benefit of laborers or materialmen is dependent entirely on the terms of the bond, *and in the absence of a provision promising to pay laborers and materialmen, no such action can be maintained,* although where such provision exists, such an action is proper." (Emphasis supplied.)

A case exactly in point is *Massachusetts Bonding & Ins. Co. v. United States R. Corp.*, 97 S.W. 2d 596, 265 Ky. 661. The identical bond provisions are involved, the statute is almost identical, and the general situation is the same. A recovery by the materialman on the bond was denied.

In this case a public contractor's bond conditioned only to indemnify the named obligee against loss or damage directly arising by reason of the contractor's failure faithfully to perform the contract was held not to inure to the benefit of laborers and materialmen, where the contract stipulated that the contractor should provide and pay for all materials and labor necessary for the work, and that he should furnish a bond covering the faithful performance of the contract and the payment of all obligations arising thereunder, in such form as the owner might prescribe, where the bond as given did not embody any provisions for the benefit of third parties, but expressly provides that no right of action should accrue thereon to or for the use or benefit of anyone other than the obligee named therein. This case in all of its salient features is identical to the case at bar, and is very persuasive against the claim of appellant. The Court said, at Page 587:

> "The right of materialmen to recover payment of their bills of the surety in bonds of this class usually rests upon the conception that they are made in part for their use and benefit, and the right of action inures to those materialmen directly against the surety. But there can be no such implication or conception here, for, in addition to the above-quoted clause, which merely bound the surety to indemnify the owner against loss or damage, it was very clearly stipulated to the contrary. Among the terms of the bond and suretyship is the following: 'That no right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the obligee herein named; that the ob-

ligation of the surety is and shall be construed strictly as one of suretyship only.' "

Another case similar to the one at bar is *United States v. Farley, et al.,* 91 Fed. 474. In that case a contractor entered into a contract with the United States to construct certain wing dams and, to secure proper performance thereof, executed a bond, with sureties, to "promptly make full payments to all persons supplying them with labor or materials in the prosecution of the work provided in said contract"; the contractor entered into an agreement with a subcontractor that said subcontractor would furnish certain materials; the subcontractor supplied the materials and was paid in full by the contractor; however the subcontractor failed to pay his employees and they brought an action against the contractor and his surety on the bond given the United States. In holding for the defendants, the Court said:

> "* * * In this case, therefore, the plaintiffs are not entitled to judgment in their favor, unless they fairly come within the terms of the bond itself, * * *" "Full payment having been made by (the contractor) to (the subcontractor) for the stone by him delivered and used in the work, (the contractor) have met and performed the conditions of the bond sued on, and there is no ground shown which would justify the court in holding that (the contractor) are bound to pay the wages of all the workmen employed by (subcontractor). Such a construction of the contract would result in preventing a contractor with the government from contracting in his own behalf for the delivery of any material by a third party, unless he was willing to assume the payment of all claims against the subcontractor, * * *. Having paid to (subcontractor) the full amount coming to him, (contractor) have performed all the conditions imposed on them or their sureties by the terms of the bond sued on. * * *" (Enclosures in parentheses substituted in lieu of names of parties.)

The case at bar contains no such requirements in the bond as does the cited case but in the instant case, it clearly appears that appellee paid the subcontractor in full for materials furnished; to hold appellee liable for materials supplied the subcontractor by appellant would, in the words of the *Farley* case, "result in preventing a contractor * * * from contracting in his own behalf for the delivery of any material by a third party, unless he was willing to assume the payment of all claims against the subcontractor * * *" It is submitted that no such harsh result was intended by the law.

The Supreme Court of Arizona recognizes the fact that the obligations of the bond cannot be extended beyond the plain terms of the bond unless the statute specifically requires it. In *Ward v. Johnson,* 72 Ariz. 213, 232 P.2d 960, a plaintiff attempted to recover against the bond of a police officer. The Court pointed out that if the bond had been an official bond as defined by statute, its terms would extend to the plaintiff and permit his recovery. It pointed out, however, that in the absence of a specific statute giving the plaintiff the benefit of the bond, he was not covered. Said the Court at Page 215 of the Official Reporter:

> "Although there are some jurisdictions not in accord, the prevailing and foregoing view is that the obligation of a surety on its bond cannot be extended outside the terms of the instrument itself. The rule is well stated in United States Fidelity & Guaranty Co. v. Crittenden, 62 Tex. Civ. App. 283, 131 S.W. 232; '* * * Unless there be some express provision of law, which would be read into the bond as a part thereof, authorizing suit upon such official bond by an individual for a wrong done him by an officer, then the well-settled principle of law that the obligation of a surety cannot be extended beyond the terms of his bond nor to one not a party thereto would seem to be applicable, as the bond only created

relations between the city as an entity which the official represented and such official * * *'. See also Carr v. City of Knoxville, for use of Monday, 144 Tenn. 483, 234 S.W. 328, 19 A.L.R. 69; City of Eaton Rapids, to use of Snyder vs Stump, 127 Mich. 1, 86 N.W. 438; Alexander v. Ison, 108 Ga. 745, 33 S.E. 657; Cushing v. Lickert, 79 Neb. 384, 112 N.W. 616; District of Columbia, to use of Langellotti v. Federal & Deposit Co. of Maryland, 50 App. D.C. 309, 271 F. 383."

Counsel relies on *Webb v. Crane Co.*, 52 Ariz. 299, 80 P.2d 698. The difference is that in the *Webb* case there was a bond which expressly gave third parties a right to sue on the bond directly. In the *Indiana* case referred to by appellant in its brief, the right to sue third persons was extended by interpretation where the bond was silent on the subject. Here the bond is *not* silent, but it specifically provides that third persons cannot sue upon it. Likewise its condition shows that it is strictly an indemnity bond for the protection of the obligee and no one else.

In the case of *United States Use of Hill v. American Surety Co.*, 200 U.S. 197, 50 L.Ed. 437, 26 S.Ct. 168, cited by appellant, the contract provides that the prime contractor "shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material." The bond in connection therewith provided that if the prime contractor "shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue." The facts in this case show that the principal contractor entered into a written contract with the United States for the construction of certain observation towers for an agreed compensation. The principal contractor then engaged a subcontractor to perform certain

portions of the work; this subcontractor in turn engaged another party to paint certain of the observation towers, and agreed to pay him, therefor, a certain sum. This latter party is the plaintiff in the cited case and was not paid for work performed; subsequently, he brought an action on the bond against the bonding company. In this instance there was a statute which specifically required that persons entering into formal contracts with the United States "shall be required before performing such work to execute the usual penal bond with good and sufficient surety with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract."

The Supreme Court in this case held that a materialman furnishing materials to a subcontractor was protected, but its reasoning was based solely on the provisions of the statute and the bond executed in accordance therewith; the Court in its opinion said:

> "In view of the declared purpose of the statute, in the light of which this bond must be read, and considering that the act declares in terms the purpose to protect those who have furnished labor or material in the prosecution of the work, we think it would be giving too narrow a construction to its terms to limit its benefits to those only who supply such labor or materials directly to the contractor. The obligation is 'to make full payments to all persons supplying it with labor or materials in the prosecution of the work provided for in said contract.' This language read in the light of the statute, looks to the protection of those who supply the labor or materials provided for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied."

The *City of Portland v. New England Casualty Company,* 78 Oregon 195, 152 P. 253, also cited in appellant's brief, is similar to the *Hill* case and was based primarily upon the wording of a somewhat like statute which required that bonds be executed for the protection of all laborers and materialmen. The statutes of Arizona merely require that the contractor furnish a bond in the amount of the contract conditioned upon the faithful performance of the contract. Arizona has no statute which directs or requires the bond to be conditioned for the benefit of laborers or materialmen. It is, therefore, pointed out that this is a matter for legislative action, rather than a matter for judicial legislation. It is basic that the Courts cannot make the laws but may only interpret existing laws. If the State of Arizona desires bonds given for the protection of laborers and materialmen on public buildings or improvements, then it should so legislate and phrase a statute accordingly, requiring, as in the *Hill* case, "that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract".

From the foregoing authorities, it is clear that a bond which is of the type furnished in this case does not inure to the benefit of appellant. The only cases which have ever allowed a third party to recover on a bond of this type, have been in jurisdiction where there was a statute which expressly and unequivocally required all public bonds to be conditioned for the benefit of third parties. And even when this was the situation, the cases are evenly divided as to allowing recovery; some courts reading such a statute into the bond, and other courts refusing to do so because that would create a new and different contract for the parties.

In the instant case, since Arizona has no statute which directs or requires the bond to be conditioned for the benefit of appellant, the bond as given is in harmony with our statute, and there is no room whatever for doubt. The bond is not altered by our statute, and the terms of the bond give appellant no right of action.

It is submitted that under these circumstances the cases are clear that a third party, such as the appellant, may not recover on the bond.

III. Forbes Fully Complied With the Provisions of the Contract and the Statutes and Therefore There Has Been No Breach of the Contract and No Violation of the Statute and No Constructive Trust Could Be Impressed on the Retention Funds in Favor of the Appellant.

Section 10-610 of the 1939 Arizona Code, as amended, provides, in part: "Ten (10%) percent of all estimates as guarantee *of the complete performance* of the contract, to be paid to the contractor within sixty-five (65) days after completion, or on filing of notice of completion, or (of) the contract, provided the contractor has duly furnished the agent *satisfactory receipts* for all labor and material bills and waivers of liens from any and all persons holding claims against the work." (Emphasis supplied.)

On page 29 of appellant's brief, he states "that this 10% retention fund shall be paid to the contractor on the happening of both of the following events:

> "(a) That 65 days have elapsed after completion of the contract."
>
> "(b) That the contractor has duly furnished to the Board of Supervisors 'satisfactory receipts' for all labor and material bills and waivers of liens from any and all persons holding claims against the work."

As can be clearly seen from the language of the above quoted provisions of Section 10-610 of the 1939 Arizona Code, as amended, one of the conditions for the payment to the contractor of the 10% retention fund is not that 65 days have to elapse after completion of the contract, but merely that when, after completion, the contractor furnishes the Board of Supervisors with *satisfactory receipts* for all labor and material bills and waivers of liens from any and all persons holding claims against the work, the contractor shall be paid *within* the 65 day time limit. Therefore, if the contractor furnished to the Board of Supervisors *satisfactory receipts* for all labor and material bills, on the day after completion, the contractor would then be entitled to receive the 10% retention fund.

Forbes entered into a contract with a subcontractor, W. M. Bachman, dba Bachman Plumbing Company, for the said subcontractor to furnish all necessary labor and materials for the installation of certain plumbing equipment. The subcontractor purchased plumbing materials and supplies from the appellant, American Radiator and Standard Sanitary Corporation. The subcontractor, Bachman, was paid in full for all labor and materials by Forbes and, thereafter, Forbes furnished a satisfactory receipt from the subcontractor, Bachman, to the Board of Supervisors.

As the subcontractor Bachman was the only person that Forbes had contracted with to furnish all plumbing materials and labor, the subcontractor Bachman was then the only one entitled to receive payment for the plumbing materials and labor furnished, and the subcontractor's, Bachman's receipt for payment of all plumbing materials and labor furnished was a *satisfactory receipt* and was properly accepted by the Board of Supervisors. It is clear that Forbes has paid for all materials which were used in the

school building, and that Forbes had no dealings with the appellant whatever, and that Forbes in no way violated the provisions of the statute as to furnishing satisfactory receipts.

Bachman furnished the material, he performed the labor, and he was entitled to the pay. The one entitled to the compensation is the one with whom Forbes directly contracted and who, in turn, supplied the materials and the labor for the job. Unquestionably, a receipt from Bachman was a "satisfactory receipt".

The ten (10) percent retention fund clause in the statute was inserted for the protection of the public body, inasmuch as it provides that the ten (10) percent "shall be retained * * * as guarantee of the complete performance of the contract". This clause surely was not inserted as a guarantee for the payment of third persons.

Appellant contends that the latter part of the statute, Section 10-610 of the 1939 Arizona Code, as amended, which requires the School District to retain ten (10) percent of the estimates until satisfactory receipts have been furnished, has somehow been violated. This provision of the statute merely covers the procedure to be followed by the School District, in letting contracts and provides a means for the School District to protect itself by withholding moneys until the building is satisfactorily completed.

Appellant seems to be of the opinion that the purpose of Section 10-610 of the 1939 Code, as amended by the 1952 Supplement, was to protect such materialmen as appellant hereinasmuch as a lien could not be enforced against public buildings. This Section is contained in Article 6 of the 1952 Supplement, which Article is titled—"County, Municipal, and School District Indebtedness"; Section 10-610 bears the heading, "Erection of buildings for which bonds voted—

Method of payment." Construing the quoted titles in conjunction with the explicit wording of the section contents, it is very apparent that the sole purpose of the particular section was to provide for the manner in which payment was to be made on the contract and to provide adequate safeguards for the School District so that said District would be assured of proper completion of the work. If the Legislature had intended a result such as propounded by appellant, it would have been a very simple process to definitely word the statute accordingly.

The liability of a party to a contract is measured by the terms of the contract and there can be no liability arising as a result of a contract, unless there has been some breach of the terms of that contract by the party upon whom liability is to be imposed, 17 C. J. S. pages 942, 943 and 944. In the instant case there has been no breach.

One of the clauses which appellant contends has been violated requires the contractor to "provide and pay for all materials, etc.". The agreed facts are that the appellant sold the materials on credit to Bachman, and Bachman resold them to the general contractor who paid Bachman in full for them.

Bachman acquired title to the goods when he purchased them from the appellant, and then he resold them to the general contractor, who paid him in full. Thus, all materials which went into the work have been paid for by the general contractor, and he has in no way violated the clause of his contract requiring him to pay for all materials.

It is clear that appellant has no claim against anyone other than the subcontractor. This was the person with whom it dealt, the person to whom it sold the goods, and the person to whom it saw fit to advance credit. It is undisputed that Forbes has fully paid Bachman for these mate-

rials. His contract surely did not require him to pay twice for the same goods.

If appellant's contention were to be accepted, there would be no limit to how far back along the chain of credit one could go, and still come in and say that the goods which went into the school building were "not paid for". If appellant's claim is good, then the claim of a steel mill which sold steel on credit to the appellant, or the claim of an ore mine which sold ore on credit to the steel mill, would be equally good. This is not the law, and no citation of authority is necessary to sustain the point that the sale of property does not carry with it the obligation to discharge a personal debt, which the seller may have incurred to another when he purchased the property.

The last argument advanced by appellant is that there is a "constructive trust" as to the money which the School District paid to Forbes. A constructive trust is a trust "ex maleficio", or "ex delicto". It only comes into being when there has been a wrongful or illegal act. If there has been no wrong or illegal act, there can be no constructive trust.

In its brief, appellant points to the case of *Western Lumber and Pole Co. v. City of Golden,* 23 Colo. App. 461, 130 Pac. 1027, as authority for the imposition of a constructive trust. In that case, the Court, speaking of the statute, says as follows:

> "The title of the act here under consideration reads as follows: 'An act to *secure the payment of claims of laborers, subcontractors, and others performing labor and furnishing materials upon public works* constructed under the authority of cities, incorporated towns and school districts.' It is manifest from the title of the bill that its purpose was to secure the payment of claims for which the city was not theretofore, under pre-existing laws, liable." (Emphasis supplied.)

The Court goes on and discusses the rights given by the statute, the new duty which is expressly imposed on the City by the statute, and the new obligations which this statute created. The distinctions between the Colorado statute and our Arizona statute are obvious.

The Colorado statute declares that its express purpose is to secure the payment of claims of laborers and those furnishing material for public works; and that statute specifically directs the public agency to retain certain amounts in order to satisfy the claims of the laborers and materialmen. This purpose is expressly declared, and the statute imposes a duty on the public agency to see that claims of laborers and materialmen are satisfied. It sets forth how they shall file claims, how they shall be paid, and so on. How different this is from the Arizona statute which appellant is attempting to distort to that purpose, and in which no such purpose is expressed and no such duty is imposed. Our statute is primarily designed for the protection of the public agency and is designed to assure the public agency of the satisfactory completion of the work by the contractor. There is nothing in our statute which required the school district to insert provisions in its contract for the benefit of appellant, or to otherwise act for the benefit of appellant in any way.

Consequently, that case has no bearing or application upon the instant case because our statute contains no such provisions.

In discussing the rights of a materialman in and to the statutory retained percentage, due to a contractor from a school district, C.J.S. in Volume 78, at Page 1316, says:

> "In the absence of statute conferring the lien, the money due from the district or other local school organization to the contractor is not subject to a lien in favor of subcontractors, laborers, or materialmen, but

in a number of jurisdictions such lien is conferred by statute."

The Colorado statute does set out a method whereby laborers and materialmen can assert a lien or claim to such fund. The Arizona statute does not.

No law was violated by the payment or acceptance of this fund. In this respect, we have heretofore shown that neither the statute, contract, or bond, conferred any rights upon appellant, or created any obligation on the part of the School District or the General Contractor towards appellant. Suffice it to note that constructive trusts are creatures of equity, and are not to be invoked except in aid of equity. Constructive trusts are a wrong-rectifying device, and unless there has been some wrong, there can be no constructive trust.

CONCLUSION

In conclusion, we would like to make the observation that one person ought not to be made to pay the debt of another, except upon a clear and satisfactory showing that he obligated himself to do so.

In this case, we have shown that neither by the contract, the bond, nor the statute, was any such obligation undertaken. We have shown that the law imposes no liability, and the inherent equity of the situation is likewise in accord with this position. If a loss has occurred to appellant, appellant alone is responsible for that loss. It was under no obligation to sell goods on credit to Bachman. If it wanted safeguards, it could have obtained them for the asking. Instead of this, appellant indiscriminately advanced credit and now is attempting to fasten a loss, caused by its own improvidence, upon innocent persons.

Justice demands that the appellant look for its payment to the person to whom it chose to advance credit, and not to another. The judgment of the District Court should be affirmed.

Dated at Phoenix, Arizona.
November 13, 1957.

Respectfully submitted,

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